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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN MONTI ,

Cross-complainant and Appellant,

v.

CITY OF SAN DIEGO et al.,

Cross-defendants and Respondents.

D054430

(Super. Ct. No. 37-2007-00077593-  
CU-CR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

I.

INTRODUCTION

John Monti filed a first amended cross-complaint against the City of San Diego, the San Diego Police Department, and San Diego Police Detective Patrick Lenhart

(cross-defendants)<sup>1</sup> in which Monti claimed that the cross-defendants had violated Civil Code section 52.1 by charging him in a criminal complaint with nine misdemeanor offenses, including battery, committing a hate crime, and filing a false police report, arising from a physical altercation between Monti and several "migrant workers."<sup>2</sup> Monti alleged that the cross-defendants instituted the criminal action in order to prevent him from exercising his constitutional right to criticize law enforcement authorities for failing to enforce laws against illegal immigration and child prostitution.

Cross-defendants filed a demurrer to Monti's first amended cross-complaint. With respect to Detective Lenhart, the demurrer claimed that he was statutorily immune from Monti's claim because all of Detective Lenhart's alleged actions were taken in the course of instituting or prosecuting the underlying criminal action against Monti. Cross-defendants argued that the City of San Diego and the San Diego Police Department were also statutorily immune from liability, in light of Detective Lenhart's immunity. The trial court sustained the demurrer without leave to amend and dismissed the action as to the cross-defendants.

On appeal, Monti claims that the trial court erred in sustaining the cross-defendants' demurrer. We affirm the judgment of dismissal.

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<sup>1</sup> The underlying complaint in this action is not material to this appeal, and was the subject of a prior appeal decided by this court. (*Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325.)

<sup>2</sup> Monti also brought claims against several of the workers, including a violation of Civil Code section 52.1 and battery. Monti's claims pertaining to the workers are not relevant to this appeal.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Monti's first amended cross-complaint*

In September 2008, Monti filed the operative first amended cross-complaint. Monti alleged that on November 18, 2006, he stopped at a day labor site in an attempt to take photographs and hand out fliers to potential employers concerning the practice of hiring illegal immigrants. Monti claimed that while he was taking photographs of "migrant workers," the workers "became hostile." According to Monti, several of the workers physically attacked him. Monti also alleged that a number of bystanders witnessed the attack, and that at least four people called 911 to report the attack to police. Monti alleged that a police officer responded to the scene, spoke to Monti, and collected several of the photographs that Monti had taken of the attackers. Monti further alleged that the following day, the police arrested Jose Balzaga, who Monti claimed was one of the men who had attacked him. According to Monti, Balzaga told police that Monti had attacked one of the workers, and that Balzaga became involved in the altercation in an attempt to defend the worker.

In the first allegation in the first amended cross-complaint pertaining to cross-defendant Detective Lenhart, Monti claimed:

"Lenhart, without having spoken with the independent witnesses driving by, decided that Monti had single-handedly initiated an attack against nine day laborers . . . and won! At the insistence of migrant rights activist Claudia Smith . . . Lenhart managed to conjure up additional evidence to claim that this was a 'hate crime' promulgated by Monti on the day laborers. However, the first mention of any 'racial slur' or evidence of this so called 'hate crime'

was by Smith in an email she sent to Lenhart nearly two months after the attack."

Monti alleged that he first learned that "charges would be filed against him for attacking the day laborers," when Smith made a statement to this effect on a national television program. Monti claimed that shortly after he viewed the television program, he "received notice in the mail confirming that he was being charged in a criminal complaint with nine counts, including battery, hate crime, and filing a false report." Monti alleged that he pled not guilty to the charges, and that he was forced to undergo a trial, at which a jury found him not guilty of the charged crimes.

In a cause of action entitled "Violation of [Civil Code section] 52.1," Monti alleged:

"Lenhart, working with Smith, and unknown representatives of the City of San Diego City Attorney's Office, as well as other [San Diego Police Department] officers, without legal justification, and knowing that Monti had committed no crime, charged Monti in the underlying criminal action in an attempt to coerce and silence him and to prevent him from expressing his political views in opposition to illegal immigration and child prostitution. The action was done, in part, because Smith and Lenhart wished to prevent Monti, or anyone else, from publicly opposing illegal immigration and the resultant child prostitution."

Monti claimed that the cross-defendants were liable pursuant to Civil Code section 52.1:

"As a proximate result of the actions described above . . . Monti was denied his right to exercise his First Amendment Rights under the United States Constitution and the California Constitution to speak out against what he believes to be the failure of law enforcement, and other officials, in the United States, including those of [San Diego Police Department] and [the City of San Diego], to enforce current laws regarding illegal immigration and child prostitution. As

a result, Monti has suffered damages in an amount to be shown at the time of trial."<sup>3</sup>

B. *The cross-defendants' demurrer and Monti's opposition*

Cross-defendants filed a demurrer to Monti's first amended cross-complaint. In their brief in support of their demurrer, cross-defendants argued that Detective Lenhart was immune from liability pursuant to Government Code section 821.6,<sup>4</sup> because all of his alleged actions were taken in the course of instituting or prosecuting the underlying criminal action against Monti. Cross-defendants argued that the City of San Diego and the San Diego Police Department were also immune from liability, in light of Detective Lenhart's immunity, pursuant to section 815.2, subdivision (b).<sup>5</sup>

Monti filed an opposition to the demurrer in which he argued that Detective Lenhart was not immune, for two reasons. First, Monti maintained that a police officer may be liable for making a false arrest, notwithstanding section 821.6. Monti argued, "Although Lenhart did not physically arrest Monti, and instead mailed notice of the charges to him, that notice is the functional equivalent to an arrest." Monti reasoned, "The result of being arrested or being issued a citation is the same, Monti's freedom was

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<sup>3</sup> Monti also brought this Civil Code section 52.1 claim against Smith. Monti's claim as to Smith is not relevant to this appeal.

<sup>4</sup> Unless otherwise specified, all subsequent statutory references are to the Government Code. Section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

<sup>5</sup> Section 815.2, subdivision (b) provides: "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

restricted and he was compelled to go to court." Monti also contended that, "[Section] 821.6 is not a blanket liability shield for public employees so as to leave no recourse against government violations of the civil rights of the citizens of California [pursuant to Civil Code section 52.1]."

Cross-defendants filed a reply to Monti's opposition. In their reply, cross-defendants acknowledged that section 821.6 does not provide immunity to public employees for their commission of false arrest or false imprisonment. Cross-defendants argued, however, that Monti had not pled false arrest or false imprisonment, but rather, had alleged that Detective Lenhart and others had improperly instituted criminal charges against him. Cross-defendants maintained that the act of filing a criminal charge against a person is clearly within the immunity afforded by section 821.6, and contended that the immunity afforded by section 821.6 is not inconsistent with Civil Code section 52.1.

Cross-defendants requested that the trial court take judicial notice of both the March 2007 complaint in the underlying criminal action against Monti, and a document entitled "Notice to Defendant." The notice contained the address of the Office of the City Attorney and Monti's name and address, and stated that a criminal complaint had been filed against Monti. The notice instructed Monti to appear in court on a particular date and time for a misdemeanor arraignment. The notice further stated, "Appearance is mandatory. Failure to appear as above notified may result in a warrant of arrest being issued against you."

C. *The trial court's ruling and Monti's appeal*

The trial court held a hearing on the cross-defendants' demurrer.<sup>6</sup> At the conclusion of the hearing, the trial court sustained cross-defendants' demurrer without leave to amend. The court reasoned:

"Cross-Defendants' motion is premised on the immunity afforded by [section] 821.6. In opposition, Monti relies on *Gillan v. San Marino* (2007) 147 Cal.App.4th 1033 [(*Gillan*)] which holds "[b]ecause . . . section 821.6 provides no immunity from liability for false arrest or false imprisonment [citation], section 821.6 provides no immunity from liability under Civil Code section 52.1 based on an arrest without probable cause." [(*Gillan, supra*, 147 Cal.App. 4th at p. 1050).] The first amended cross-complaint does not allege Monti was arrested without probable cause. Rather, the first amended cross-complaint alleges Monti received notice he was being 'charged' with nine counts [citation] and [cross-defendants] 'charged' Monti [citation]. Although Monti argues issuance of a citation is the same as a physical arrest, Monti provides no authority so holding. The court previously allowed Monti the opportunity to plead an arrest without probable cause.<sup>[7]</sup> Like the initial cross-complaint, the first amended cross-complaint is devoid of this essential allegation. Therefore, Cross-Defendants are immune from liability under [section] 821.6. [Citations.] Monti fails to demonstrate a reasonable probability the [first-amended] cross-complaint can be amended to plead a basis for liability against Cross-Defendants. Cross-Defendants demurrer is sustained without leave to amend. [Citations.]"<sup>8</sup>

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<sup>6</sup> The reporter's transcript from the hearing is not contained in the record.

<sup>7</sup> Monti's initial cross-complaint contained allegations pertaining to the cross-defendants similar to those contained in the first amended cross-complaint. The cross-defendants filed a motion for judgment on the pleadings, which the trial court granted, with leave to amend.

<sup>8</sup> In its order sustaining the cross-defendants' demurrer without leave to amend, the trial court granted cross-defendants' request for judicial notice of the complaint in the underlying criminal action and the notice to appear.

The trial court entered a judgment dismissing Monti's action in December 2008. Monti timely appeals from the judgment of dismissal.

### III.

#### DISCUSSION

*The trial court did not err in sustaining the cross-defendants' demurrer without leave to amend*

Monti claims that the trial court erred in sustaining the cross-defendants' demurrer without leave to amend. Monti appears to contend that the first amended cross-complaint states a cause of action or, alternatively, that he could amend it to state a cause of action.

A. *The law governing demurrers*

This court applies the following well established law in reviewing a trial court's order sustaining a demurrer without leave to amend:

" 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"Where the complaint's allegations or judicially noticeable facts reveal the existence of an affirmative defense, the "plaintiff must 'plead around' the defense, by alleging specific facts that would avoid the apparent defense. Absent such allegations,



the complaint is subject to demurrer for failure to state a cause of action. . . ." [Citation.]" [Citation.]" (*Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 566.)

B. *Relevant substantive law*

Civil Code section 52.1, subdivision (b) provides in pertinent part:

"Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with . . . may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages . . . ."

As noted previously (see fn. 4, *ante*), section 821.6 provides that a public employee is not liable for instituting or prosecuting a judicial proceeding within the scope of his employment, even if he acts maliciously and without probable cause. Section 815.2, subdivision (b) provides generally that a public entity is not liable for its employee's act where the employee is immune from liability. (See fn. 5, *ante*.)

In *County of Los Angeles v. Superior Court* (2009) 181 Cal.App.4th 218 (*County of Los Angeles*), the plaintiffs brought a lawsuit against the County of Los Angeles and its prosecutor alleging various causes of action, including a claim pursuant to Civil Code section 52.1. The plaintiffs' claims were based on injuries that they allegedly suffered as a result of the prosecutor's search and seizure of plaintiffs' property conducted pursuant to a criminal investigation. (*County of Los Angeles, supra*, 181 Cal.App.4th at p. 222.) The prosecutor argued that he was immune from liability pursuant to section 821.6, and the county claimed that it was immune from liability pursuant to section 815.2, subdivision (b). (*County of Los Angeles, supra*, 181 Cal.App.4th at p. 277.)

The *County of Los Angeles* court described cases in which courts had considered the scope of section 821.6:

"California courts construe section 821.6 broadly in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits. [Citations.] [Citation.] [¶] . . . [¶] Courts have held that the institution and prosecution of [a] judicial proceeding in Government Code section 821.6 is not limited to the act of filing a criminal complaint. Acts taken during an investigation prior to the institution of a judicial proceeding are also protected by section 821.6 because investigations are an essential step toward the institution of formal proceedings. [Citations.]" (*County of Los Angeles, supra*, 181 Cal.App.4th at pp. 228-229.)

In applying this law, the *County of Los Angeles* court concluded that the prosecutor was immune from liability on plaintiffs' Civil Code section 52.1 claim pursuant to section 821.6 because "all of the acts of which plaintiffs complain were triggered by allegations of criminal activity and were part of the investigation and prosecution process. . . ." (*County of Los Angeles, supra*, 181 Cal.App.4th at p. 230.)<sup>9</sup>

The *County of Los Angeles* court specifically rejected the plaintiffs' argument that, "Civil Code section 52.1 prevails over the Government Code section 821.6 immunity," (*County of Los Angeles, supra*, 181 Cal.App.4th at p. 231), reasoning:

"Plaintiffs also argue that defendants were not entitled to prosecutorial immunity because immunities were not intended to prevail over statutes, such as Civil Code section 52.1. But, 'under California law, "[i]t is generally recognized that a statutory governmental immunity overrides a statute imposing liability." [Citations.] Thus, absent "a clear indication of legislative intent that

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<sup>9</sup> Citing section 815.2, subdivision (b), the *County of Los Angeles* court also concluded, "Because the [prosecutor] is shielded from liability, the County is immune." (*County of Los Angeles, supra*, 181 Cal.App.4th at p. 232.)

statutory *immunity* is *withheld or withdrawn*," a specific statutory immunity applies to shield a public employee from liability imposed by a particular statute. [Citations.]' (*O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 504 [holding Gov. Code, § 820.6 qualified immunity protected against Civ. Code, § 52.1 claims].) *O'Toole* examined Civil Code section 52.1 and 'found no indication the Legislature intended to create an exception to the general rule. Civil Code section 52.1 contains no indicia reflecting an intent that public employees may be sued despite a statutory immunity that would otherwise apply.' (*O'Toole, supra*, at p. 504, 44 Cal.Rptr.3d 531.) Accordingly, we reject plaintiffs' contention . . . ."

"Section 821.6 'applies to police officers as well as public prosecutors since both are public employees within the meaning of the Government Code.' [Citation.]" (*Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 757 (*Asgari*).)

### C. *Application*

Monti alleged in the first amended cross-complaint that he was injured when cross-defendants "*charged* Monti in the underlying criminal action. . . ." (Italics added.) In addition, all of the actions taken by Detective Lenhart and the unnamed public employees that Monti alleged in the first amended complaint related directly to "instituting or prosecuting [a] judicial . . . proceeding." (§ 821.6.) Because all of the acts of which Monti complains were part of the investigation and prosecution process, Detective Lenhart is immune from the allegations in the cross-complaint, and cannot be found liable for a violation of Civil Code section 52.1. (*County of Los Angeles, supra*,

181 Cal.App.4th at p. 230.)<sup>10</sup> Accordingly, the trial court properly sustained the demurrer as to him. (*Doe II v. MySpace Inc.*, *supra*, 175 Cal.App.4th at p. 566 [demurrer must be sustained where complaint's allegations reveal the existence of defense].)

Because Detective Lenhart and the unnamed public employees are immune from Monti's claim, the City of San Diego and the San Diego Police Department are also immune, pursuant to section 815.2, subdivision (b). (*County of Los Angeles*, *supra*, 181 Cal.App.4th at p. 228.) Thus, the trial court properly sustained the demurrer as to the City of San Diego and the San Diego Police Department. (*Doe II v. MySpace Inc.*, *supra*, 175 Cal.App.4th at p. 566.)

Further, the trial court did not abuse its discretion in sustaining the cross-defendants' demurrer *without* leave to amend. In initially sustaining the cross-defendants' motion for judgment on the pleadings *with* leave to amend, the trial court provided Monti an opportunity to attempt to amend his cross-complaint so as to sufficiently state a cause of action. He failed to do so. Instead, in his first amended cross-complaint, Monti again

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<sup>10</sup> In his reply brief, Monti refers to evidence that he filed a grand jury complaint on March 1, 2007 against various San Diego police officers alleging a failure to investigate child prostitution in certain "migrant camps." Monti claims that this evidence demonstrates that the cross-defendants' "motive" for filing a criminal complaint against him in late March 2007 was "outside the scope of [their] employment" under section 821.6.

Assuming for the sake of this opinion that Monti has not forfeited this argument by raising it for the first time in his reply brief, we reject it. Section 821.6 provides immunity even if the public employee is *motivated* by malice, as long as the *act* of instituting or prosecuting the criminal case was taken within the scope of the public employee's employment. Thus, even assuming that cross-defendants had a malicious motive in filing the underlying criminal complaint against Monti, they would still be immune from Monti's action pursuant to section 821.6.

alleged that Detective Lenhart and other unnamed public employees "charged" him in an attempt to prevent him from exercising his First Amendment rights. Section 821.6 provides public employees immunity from such a claim.

Further, as the trial court recognized in its order sustaining cross-defendants' demurrer, Monti has not demonstrated that he could allege a cause of action for false imprisonment based on false arrest.<sup>11</sup> "The elements of a tortious claim of false imprisonment are: (1) the nonconsensual, intentional confinement of a person, (2) without lawful privilege, and (3) for an appreciable period of time, however brief.' [Citation.]" (*Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880, 888.) " '[F]alse arrest" and "false imprisonment" are not separate torts. False arrest is but one way of committing a false imprisonment . . . .' [Citation.]" (*Asgari, supra*, 15 Cal.4th at p. 753, fn. 3.) In his opposition to the cross-defendants' demurrer, Monti acknowledged that "Lenhart did not physically arrest [him]." Monti has not cited a single case, and we are aware of none, holding that a public employee may be liable for false arrest in the absence of a *physical* arrest. (Cf. Pen. Code, § 834 ["An arrest is taking a person into custody . . . ."].)

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<sup>11</sup> "Under California law, a police officer is granted statutory immunity from liability for malicious prosecution, but not for false arrest and imprisonment." (*Asgari, supra*, 15 Cal.4th at p. 753; compare section 821.6 [providing public employees with immunity for instituting or prosecuting a criminal action] with section 820.4 ["A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."])

Citing various provisions of the Penal Code, Monti also argues that he "*should* have been physically arrested" (italics added), and that the cross-defendants refrained from doing so in order to avoid civil liability.<sup>12</sup> Even assuming that the cross-defendants intentionally elected not to physically arrest Monti for the reason he suggests, Monti has not demonstrated that the cross-defendants may be subjected to civil liability for their *failure* to arrest him. This argument thus provides no basis for reversal.

#### IV.

#### DISPOSITION

The judgment is affirmed. Monti is to bear costs on appeal.

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AARON, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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McDONALD, J.

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<sup>12</sup> Although Monti argues in his brief that the cross-defendants refrained from arresting him in order to avoid civil liability, he also states, "Monti was not arrested as required for unknown reasons . . . ."